

Monongahela Power Company and Jay L. Bolyard.
Cases 6-CA-24460 and 6-CA-24515

June 24, 1994

DECISION AND ORDER

BY MEMBERS STEPHENS, DEVANEY, AND COHEN

On April 5, 1993, Administrative Law Judge Richard H. Beddow Jr. issued the attached decision. The Respondent filed exceptions, a supporting brief, and a reply brief. The General Counsel filed an answering brief.

On October 25, 1993, the National Labor Relations Board (in an unpublished decision) remanded the proceeding to the judge for certain further findings of fact, credibility resolutions, conclusions of law, and recommendations concerning the Respondent's defenses to the allegation that it acted unlawfully when it discharged the Charging Party.

The judge issued the attached supplemental decision on January 12, 1994. Subsequently, the Respondent filed exceptions to the judge's supplemental decision and a supporting brief, and the General Counsel filed limited exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the judge's decision, erratum, and supplemental decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,¹ findings,² and conclusions³ and to

*The judge issued an erratum to the decision on April 16, 1993. The error noted in the erratum has been corrected herein.

¹We affirm the judge's denial of the Respondent's motions to dismiss the complaint in Case 6-CA-24515 or, alternatively, to sever that case from Case 6-CA-24460. In so doing, we find that the issues involved in these cases are inextricably interrelated and, therefore, that deferral of Case 6-CA-24515 is inappropriate. See, e.g., *American Commercial Lines*, 291 NLRB 1066, 1069 (1988).

²The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We correct the following errors by the judge which do not affect our decision. The judge incorrectly stated that the Respondent's deadline for Bolyard's move was March 29. The actual deadline was May 29. The judge therefore erred by stating that "Respondent provides no plausible explanation of why it immediately terminated Bolyard on March 26 rather than waiting 3 days to March 29 to see if Bolyard actually would comply with its deadline." However, this error does not affect the result. The salient point is that the Respondent discharged Bolyard on March 26, 3 days after it had extended Bolyard's probationary period and had given Bolyard until May 29 to move. Significantly, Bolyard told the Respondent on March 25 that he would comply with the May 29 deadline.

³In adopting the judge's conclusion that the Respondent's removal of the Union's newsletters from a bulletin board violated Sec. 8(a)(1), we find it unnecessary to rely on his characterizations of the

adopt the recommended Order as set forth in his supplemental decision, as modified.⁴

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Monongahela Power Company, Morgantown, West Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the supplemental Order, as modified.

1. Substitute the following for paragraph 2(a).

"(a) Offer Jay L. Bolyard immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed, and make him whole for the losses he incurred as a result of the discrimination against him in the manner specified in the 'Remedy' section."

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT interfere with, restrain, coerce, or otherwise discriminate against you by discharging you for engaging in union activities or other protected concerted activity.

WE WILL NOT interfere with, restrain, or coerce you in the exercise of your rights guaranteed by Section 7 of the Act by removing union newsletters from union bulletin boards at the facilities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise your rights guaranteed by Section 7 of the Act.

action as "censorship" and an "infringement of the [Union's] free speech rights."

⁴We shall modify the reinstatement provision of the judge's recommended Order to conform to the language customarily used by the Board.

WE WILL offer Jay L. Boyland immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges he previously enjoyed, and WE WILL make him whole for the losses he incurred as a result of the discrimination against him and expunge from our files any reference to his discharge and notify him the unlawful discharge will not be used as a basis for future personnel actions against him.

WE WILL, if requested by the Union, allow the reposting of the union newsletters previously removed.

MONONGAHELA POWER COMPANY

David L. Shepley, Esq., for the General Counsel.
John C. Unkovic, Esq., of Pittsburgh, Pennsylvania, and *Edward Kennedy, Esq.*, of Fairmont, West Virginia, for the Respondent.

DECISION

STATEMENT OF THE CASE

RICHARD H. BEDDOW JR., Administrative Law Judge. This matter was heard in Fairmont, West Virginia, on October 26 and 27, 1992. Subsequently, briefs were filed by the General Counsel and Respondent. These proceedings are based on charges filed April 8 and 30, 1992,¹ by International Brotherhood of Electrical Workers, Local 2357, AFL-CIO. The Regional Director's consolidated complaint dated September 23, 1992, alleges that Respondent Monongahela Power Company violated Section 8(a)(1) and (3) of the National Labor Relations Act by discharging employee Jay L. Bolyard because he concertedly protested Respondent's request that he relocate his family within a 30-minute drive of Respondent's facility and because he assisted the Union and engaged in concerted activities. It also is alleged that Respondent violated the Act by removing reasonable and proper union newsletters from the union bulletin board at Respondent's Morgantown, West Virginia facility.

On a review of the entire record in this case and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a corporation engaged as a public utility for the provision of electrical power and it has a facility at Morgantown, West Virginia.

It annually derives gross revenues in excess of \$250,000 and purchases and receives goods and materials valued in excess of \$50,000 directly from points outside West Virginia. It admits that at all times material it has been an employer engaged in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also admits that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

Jay L. Bolyard began with the Respondent as an apprentice electrician at its Morgantown facility. He was a probationary employee for the first 6 months of his employment in accordance with article VIII, section 2, of the collective-bargaining agreement between the Respondent and the Union.

Bolyard had at least two preemployment interviews with Foreman Richard Sausen and Supervisor John Shawhan and specifically was told that he had to relocate from his residence in Rowlesburg, West Virginia (a 1-hour drive), to somewhere within a 30-minute driving range of the Morgantown facility (Respondent's so called 30-minute rule). Relocation was to occur prior to Bolyard being converted from a probationary employee to a regular employee. Neither Sausen nor Shawhan made any mention at these interviews of Bolyard's family or how the 30-minute rule might apply to his family (a wife and a school aged daughter).

Between September 23 and early March 1992, Bolyard had three brief discussions with members of management in which his residence situation was mentioned; one when Sausen asked Bolyard 1 week after he began if he had found a place to live. Bolyard replied that he had not. In December 1991, Bolyard voluntarily stated to Shawhan that he was having a problem finding a new residence. Shawhan replied that Bolyard should not worry about it, but instead concentrate on his getting a commercial driver's license (another job requirement which was met in February).

Bolyard made an effort to find a residence in compliance with the 30-minute rule in late 1991 and early 1992. Around March 1, 1992, he located a trailer in Gladesville, West Virginia, in which he planned to live while his family continued to reside in Rowlesburg until his daughter's school year was completed in June. Bolyard's family was not mentioned by anyone in management in conjunction with the 30-minute rule prior to March 13. Bolyard told Sausen about the trailer and Sausen checked it out with respect to compliance and informed Bolyard that it was acceptable.

On March 17, 1992, Sausen called Bolyard to his office and said he was going to forward the paperwork to make Bolyard a regular employee at the end of the probationary period and on Bolyard's move into the trailer in Gladesville. Sausen said Bolyard was one of the best apprentice electricians he had seen, was getting along with his peers, and had received excellent reports.

Bolyard told Sausen he would move into the trailer, but would defer moving his family within the 30-minute rule area until after his daughter completed a gifted student program she was attending in the Rowlesburg schools. Sausen said he had no objection to Bolyard's plans, but he would consult with Shawhan. A few minutes later, Shawhan came into the office and said that the arrangement with the trailer was unacceptable and explained that he believed that Bolyard would not be available on weekends due to his anticipated going home to be with his family. Shawhan told Bolyard he might be placed on a trial period status.

Immediately after leaving Sausen's office Bolyard spoke with Union Steward Timothy Hairston in a large open area adjacent to Sausen's office about his conversation with Shawhan. Bolyard and Hairston went to Hairston's nearby locker and Hairston got a copy of the contract. Bolyard and

¹ All following dates will be in 1992 unless otherwise indicated.

Hairston then reviewed article V, section 6, the section of the contract dealing with the 30-minute rule.

In the days between March 16 and 26, Bolyard spoke to Hairston in the meter shop for several minutes prior to each workday and updated Hairston on his ongoing efforts to find a new residence and discussed what members of management were saying and what his rights under the contract were with respect to the 30-minute rule. On a number of occasions over this 11-day period, Sausen acknowledged his awareness of Bolyard while he was speaking with Hairston (Sausen's office was about 6 feet from the meter shop area where Bolyard and Hairston spoke).

On March 20, Shawhan told Bolyard he would be put on a trial period (under art. VIII, sec. 2, of the contract). Bolyard then told Shawhan that he felt discriminated against due to his marital status when Shawhan reasserted that Bolyard's family had to move. Bolyard also said he believed that a problem would not exist if the facility was nonunion. Shawhan responded by stating that he did not have a problem with the Union, he had a "problem with one man in the Union." When Bolyard asked why he was being placed on a trial period, Shawhan stated that it was until Bolyard succeeded in moving his family. Bolyard argued possible different situations and Shawhan then stated that he believed Bolyard was not sure if he wanted to continue his employment, and that he should think about it but Bolyard said he he had to keep this job.

Shortly after Bolyard spoke with Shawhan, Sausen called Bolyard into his office and said he would like to help Bolyard and did not want to lose him. Shawhan then briefly came into the office and stated to Bolyard that he did not care whether he quit, and he was not changing his mind about the requirement that Bolyard's family must move. When Bolyard left, he immediately went to the nearby meter shop and spoke to Hairston about his options.

During this period of time Bolyard updated Sausen about his efforts to find a new residence and sometimes told Shawhan of his efforts but he also argued about how the 30-minute rule in the contract referred to only the "employee."

On the afternoon of March 23, the day the probationary period ended, Sausen told Bolyard that he would be receiving a letter from Division Manager Robert Cockrell directing him to have his family moved by May 29, or he would be discharged. When Bolyard asked who set the date and whether it could be extended until the end of his daughter's school year, Sausen said he did not know and that Bolyard could speak to Cockrell if he wished.

Later that day, Bolyard went to Cockrell's office and explained his efforts to find a new residence. Cockrell said he appreciated Bolyard's efforts, but he nonetheless faced a May 29 deadline to move the family. Bolyard argued his interpretation of the 30-minute rule, urging that it applied only to the employee and not the employee's family. Cockrell stated that the Company had done a poor job of communicating its position regarding that matter but Bolyard pursued his argument and cited hypothetical situations including his getting a divorce or the family members refusing to move. Cockrell responded by saying that those situations made no difference to the requirement that the family move. Bolyard asked Cockrell who set the May 29 deadline and he replied that it was set by Respondent's vice president, Thomas Barlow, and that the matter was out of his hands.

On March 24, Bolyard found a suitable apartment in Masontown, West Virginia. The landlord verbally accepted Bolyard's offer to rent the apartment but refused the offer of a deposit and 1 month's rent, promising that the place would be available to Bolyard's in about 3 weeks.

On Wednesday, March 25, Bolyard went to Sausen, and detailed his plans including his wife transporting his daughter from the new residence in Masontown to the Rowlesburg school until the school year ended. Sausen stated that he had no problem with the arrangement but that Bolyard should inform Shawhan. Shawhan was not in his office so Bolyard went to Cockrell's office where he explained the situation. Cockrell said Bolyard first said he was sorry for how he had acted on Monday but that things were okay now and he had things all worked out, then later in response to Cockrell's question about a Masontown apartment, he said that he would move in by May 29 and that the family would join him (before the end of the trial period on June 23). Bolyard understood that Cockrell had no problem with the arrangement and that he wanted Bolyard to report the development to Shawhan.

Cockrell testified that he thought of his decision the evening of the March 24 but made it on Wednesday, March 25, because:

We had an employee who had not kept a basic agreement. He hadn't kept his word to us on moving. He was, he came up with a statement that he didn't know he had to move his family.

I didn't believe that. I believe, I believe that perhaps the word family wasn't said, but I believe he knew the family had to move. I believe that he told me that he wanted to work some place else. He didn't want to work in my Division. He wanted to work in our Power Station.

On Thursday afternoon, March 26, Bolyard was called to Sausen's office. Shawhan was present when Sausen told Bolyard that the Company was not going to extend his trial period. Bolyard asked why and Shawhan said he did not have to tell Bolyard why and he would not. Bolyard went through a standard exit interview and was then escorted by Sausen and Shawhan to his locker and out of the building.

Bolyard's "Separation Notice" for the State Department of Employment Security carries an "effective date of 3-22" a date of last employment of March 26 and is dated April 3, 1992.

On March 27, 1992, Sausen held a regular morning meeting with Bolyard's former unit. He then asked the metermen to leave while he spoke with the electricians. The metermen, including Steward Hairston, left and Sausen gave an explanation for Bolyard's firing. He initially stated that Bolyard was not going to work out but when Mike Reneman asked why Bolyard was fired, Sausen replied that it was not his decision or something that he desired. He then said that Bolyard was working out very well, doing his job, learning his duties, and fitting in well with the work force, but there were circumstances involving the decision to fire Bolyard which he could not discuss and that Bolyard was having problems relocating and it was causing problems with his family. He also said Shawhan had said Bolyard had expressed interest in advancing within the Company and

Shawhan felt, because of that interest, Bolyard would be unhappy as a substation electrician. Reneman interjected that Bolyard's alleged interest in advancement should be considered a plus. Sausen agreed with Reneman, and concluded that relocation was causing problems with Jay and his family.

Hairston filed a grievance on behalf of Bolyard regarding the discharge, but it was rejected by the Company as improper because of Bolyard's status as a trial employee.

On April 28, Respondent's counsel sent a letter to Region 6 of the National Labor Relations Board stating that it was "a statement of position," the letter discussed the 30-minute rule and offered Respondent's version of certain conversations Bolyard had with Shawhan and Cockrell. Counsel stated the following:

Because the Charging Party had been told explicitly prior to the time of his hire what Monongahela expected of him, because he did not adhere to that requirement, and because in March he continued to be evasive as to when and if he was going to comply with the 30-minute rule, Cockrell decided that it would not be in Monongahela's best interest to continue to spar over the issue. Monongahela believes that the 30-minute rule is necessary for its service to customers, and that it should not permit that rule to be eroded. Monongahela did not want to begin any employment relationship with a dispute over this issue. Therefore, as was its rights under the collective-bargaining agreement, Monongahela terminated the Charging Party's employment before the end of his trial period because it simply did not wish to engage in continuing debate with him on this rule or police his compliance with it.

On April 13, Douglas Byard, acting chairman for the Union at the time, posted a union newsletter (the first newsletter ever prepared by the Union), on the bulletin board at the Morgantown facility. At 8 a.m. that day, Shawhan removed the newsletter and then told Byard he had removed the newsletter and that the newsletter did not comport with article XI, section 2, of the contract, and would not be allowed to remain posted. Byard asked Shawhan what was the problem with the newsletter. Shawhan said he would not allow postings that included organizational information (a portion of the newsletter) and also objected to alleged half-truths and false statements. No grievance was filed but a charge in Case 6-CA-24515 was filed on April 30.

A second newsletter, posted on Friday, May 22, was removed on Monday, May 26, by Shawhan under similar circumstances.

In late May or early June, Shawhan asked Byard to Cockrell's office and went through the two newsletters citing sections and statements to which they objected, specifically objected to the mention of AFL-CIO endorsements. Another discussion on this matter occurred in July 1992, and Shawhan and Cockrell objected to mention of political candidates, Cockrell also stated he would not allow anything on the bulletin board to "defame or make the company look bad in any way" or "anything contrary to the image of the company." Cockrell also objected to misinformation, lies, half-truths, and to the expression of opinion by the Union in the newsletters.

On August 24, a third union newsletter was posted on the bulletin board by Union Chairman Donald Ayersman. He was paged in the field office and told to report to Cockrell's office. When Cockrell said he had removed the third union newsletter, Ayersman asked what parts he questioned, and Cockrell stated he objected to the statement that two arbitration cases looked favorable to the Union's position because that was the opinion on the part of the Union but that the reason he removed the newsletter from the bulletin board was because of the opinions stated in the newsletter that the Respondent's health insurance coverage was "minimal" and he also objected to statements in the newsletter that alleged misleading statement's made by management.

Subsequently, Ayersman handbilled the newsletter that had been posted on August 24 to unit members without any objection by management.

Article XI, section 2, of the contracts since 1973 states:

The Company will provide bulletin board space at all reporting headquarters for the Union to post reasonable and proper notices covering legitimate Union business. Any other posting must be approved by the Manager, Morgantown Division or his designated representative before being posted.

A common thread in each of the three newsletters is a reference, in some respect, to the "dismissal or firing of a worker [Bolyard] at Morgantown."

III. DISCUSSION

At the hearing, Respondent moved to dismiss the complaint in Case 6-CA-24515, and, in the alternative, made a motion to sever. I deferred ruling on the motions, stating my preference to develop a complete record.

As noted immediately above, each of the newsletters removed by management contained a direct reference to the "dismissal" or "firing" that is the subject of the lead case as well as a reference to bringing the matter before the Board, and each was removed by either Shawhan or Cockrell, both of whom played critical roles in Bolyard's termination. The first two removals occurred within a few weeks of Bolyard's firing and I conclude that it is unquestionably clear that the two matters are closely related and appropriate for consolidation and hearing on the same record.

Otherwise, there is no element of unfairness or prejudice to the Respondent and it is clear that consolidation under these conditions is a sound administrative practice that is fully consistent with the provisions of the Administrative Procedures Act and the Board's Rules and practices.

Accordingly, Respondent's motions are denied.

Respondent's action regarding the newsletters can be described most concisely with the word "censorship." The specific language of contract provides for: "The Union to post reasonable and proper notices covering legitimate Union business."

In order for that phrase to have any meaning, it is clear that the Union negotiated the right to have the means to openly communicate what it regarded as union business to its members on a bulletin board at the facility. Accordingly, the fact that Respondent thereafter "allowed" handbilling of the information in the last newsletter is of no significance.

As noted by the General Counsel, a union newsletter, by its very nature, is to communicate to members about the status of collective bargaining, grievances, terms and conditions of employment, the election of union officers, and other matters which undeniably have an immediate effect on its members, but also as to many other developments and issues which interest members and ultimately may affect their well-being and this is inherently legitimate union business.

Here, the newsletter contains material that may be considered to be biased, pronoun opinion but that is hardly surprising and it cannot be the basis for an infringement of free speech rights of the Union. Clearly, the material in the newsletters does not approach any reasonable concept of defamatory, profane, outrageous, or inflammatory language by any objective standard and this leaves Respondent's only basis for its actions the rationale that it can censor the Union's free speech because it doesn't share the same opinion or perception of the events described.

The possibility that some statements may have been factually inaccurate (for example, because of a lack of full knowledge on the part of the Union) does not justify the removal, without consultation, of the entire newsletter. Here, the Employer's overall conduct in relation to Bolyard's discharge, as discussed below, and the timing of its actions, support an inference and the conclusion that Respondent's explanations for its actions in initially removing the newsletters are pretextual and that a major reason for its actions was the newsletters' contents relative to the matter of Bolyard's discharge.

The Respondent's attempt to immediately stifle any dissemination of information about Bolyard's discharge, as well as other legitimate union business, in a union newsletter placed on a bulletin board, conveys a chilling and coercive affect on employee rights under Section 7 of the Act, and I conclude that the General Counsel has persuasively shown that Respondent violated Section 8(a)(1) of the Act in each of the three instances, as alleged.

Concerted or Union Activity as a Motivating Factor

In a discharge case of this nature, applicable law requires that the General Counsel meet an initial burden of presenting sufficient evidence to support an inference that the employee's union or other protected concerted activities were a motivating factor in the employer's decision to terminate him. Here, the record shows that Respondent's management was well aware that Bolyard was arguing his contention that the employer's 30-minute rule under the collective-bargaining agreement applied only to him and not to his family and that he had not understood the broader interpretation when he first attempted to comply with the rule, prior to the end of his probation period on March 23. This is a term and condition of employment. Although it appears that much of his protest was directed at his personal situation, he consulted with and received affirmative encouragement from Union Steward Hairston, and I find that it had "some relation" to the collective-bargaining agreement and "to group action in the interest of employees" and therefore was protected concerted activity, see *Circle K Corp.*, 305 NLRB 932 (1991).

It is clear that Bolyard's activity in speaking to management about, in effect, the meaning and application of the rule (most specifically whether it applied not only to him but also his to family) was an issue related to terms of the collective-

bargaining agreement and conditions of employment. He spoke with fellow employee Hairston about interpretation of the contract. Bolyard's conversations with Hairston and then with management, on the same subject of contract interpretation, clearly had some relation to group action in the interest of the employees. Bolyard's principal objective may have related to his own immediate situation; however, he solicited group action with Hairston and Hairston, in fact, responded in a supportive manner. Accordingly, I find that Bolyard's action was "concerted" activity and that the General Counsel has established a prima facie case that this activity was a motivating factor in Bolyard's discharge.

Moreover, I am persuaded that management (including Shawhan) observed Bolyard in frequent conversations with Union Steward Hairston and that on March 13 Shawhan had become upset with the perceived manner in which Hairston had presented a grievance on behalf of the Union. I find that this supports an inference that Shawhan connected the two observations and suspected that Bolyard and Hairston would intersect the Union into Bolyard's residential situation.

In conclusion, I find that the General Counsel clearly has met the threshold requirements for a showing of both concerted action, see the *Circle K* case, supra, and has also shown persuasive evidence that linking probable management observation of Bolyard's interaction with Union Steward Hairston at a time, when management, in the person of Shawhan, had become uncharacteristically upset about Hairston's pursuit of a particular "safety" related grievance. Under these circumstances, the record also supports an inference that management's antiunion animus directed at Hairston was carried over to Bolyard because of his observed associations with Hairston during this same general time period and also was a motivating factor in its sudden decision to terminate Bolyard only 3 days into a newly authorized 60-day "trial period," that had replaced Bolyard's expiring probationary period.

Accordingly, the testimony will be discussed and the record evaluated in keeping with the criteria set forth in *Wright Line*, 251 NLRB 1083 (1980), see *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), to consider Respondent's defense and, in the light thereof, whether the General Counsel has carried his overall burden.

Respondent's principal defense is based on its contention that it had a right to discharge, at its sole discretion, during an employee's probationary or trial period and that it otherwise discharged Bolyard for a legitimate reason because Bolyard was dissatisfied with the job and had failed to commit to a timely move of his family that would allow him to comply with the 30-minute rule.

At the hearing Bolyard's displayed certain demeanor or mannerisms that, with repetition, could be seen to be susceptible of becoming annoying. It appears that Bolyard, although a skilled and adoptable worker, suffered untimely losses of employment in layoffs in the railroad and other industries, and could be considered to have been insecure in his probationary employment with the Respondent. He apparently displayed this insecurity in his mannerisms and conversations with both supervisors and other employees. From management's viewpoint, what was first polite and cooperative, with repetition suddenly became obsequious and annoying. Management, in the person of Shawhan, Cockrell, and Vice President Barlow, became annoyed that Bolyard was

“quibbling” on the specifics of how he would comply with Respondent’s 30-minute rule, and decided that he was “acting in bad faith.” Although Respondent had just extended Bolyard’s probation to a trial period, it suddenly decided it didn’t want to “spar” over the issue of how Bolyard complied with the 30-minute rule and decided to discharge him only 3 days into a 60-day extension.

Here, I find that Bolyard would not have been discharged so suddenly if he had not engaged in either the concerted action in continuing his argument about the meaning of the contractual 30-minute rule or in his union activity in consulting openly with the union steward about the same matter.

His discharge was not because of his failure to comply with the 30-minute rule but because of his protected concerted and union activity in arguing about it. This conclusion is especially apparent in view of the Respondent’s inconsistent and pretextual conduct and reasons which accompanied the sequence of events. Thus, I do not credit Shawhan’s testimony that Bolyard never told him on March 25, that he had found a new apartment that met the requirements, as it is inconsistent with Bolyard’s credible testimony that he told both Shawhan and Sausen as well as Cockrell, who admits that he was told. Sausen, although still a supervisor for Respondent, was not called as a witness and I infer that his truthful testimony would have essentially corroborated Bolyard’s recollections (and also would have affirmed that he had observed Bolyard’s consultations with Hairston), see *Redwood Empire, Inc.*, 296 NLRB 369 (1989).

As stated in *North Vernon Forge*, 278 NLRB 708 (1986):

The Board has consistently held that attempts by an individual to enforce the provisions of an existing collective-bargaining agreement are protected concerted activity under the Act, as long as the employee’s interpretation of the agreement has reasonable basis. E.g., *Regency Electronics*, 276 NLRB 4 (1985); *Interboro Contractors*, 157 NLRB 1295 (1966), enf. 388 F.2d 495 (2d Cir. 1967). Here, the ambiguous language of the collective-bargaining agreement made it reasonable for Roberts to believe that he had bumping rights. His efforts to enforce those rights by complaining to the Union and his supervisor are therefore protected. [Id. at 710–711.]

Both *North Vernon Forge* and the instant case deal with a probationary employee seeking to assert his rights under an ambiguous provision of the collective-bargaining agreement. Here, Bolyard’s interpretation is reasonable and it is irrelevant whether Bolyard’s interpretation of the contract was “correct.”

The Respondent makes much of the fact that it allegedly acting on the basis of two arbitration decisions on the same work rule. Shawhan’s testimony fails to indicate in an unambiguous manner that he discussed these decisions or the details of these decisions with Bolyard and Bolyard credibly testified that neither Shawhan or Cockrell mentioned them. Clearly, Bolyard was never shown the decisions.²

²Significantly, as argued by the General Counsel, the two decisions involve factual situations different from these in the instant case. The “Toothman” decision establishes the Company’s right to enforce the 30-minute rule over the objections of the employee. The “Percy” decision involves an employee who *moved himself and his*

If the Respondent was relying on these prior decisions, it failed to bring them to Bolyard’s attention or to explain them to him and thus provoked Bolyard’s questioning of why he had to immediately move his family (especially in view of the fast approaching end of his daughter’s school year). Bolyard had a reasonable basis to question his rights under an ambiguous (i.e., applicability to employee or to employee and family) contract provision. Under these circumstances, I conclude that the General Counsel has shown that he was terminated for asserting the right to argue his position and that the Respondent thereby violated Section 8(a)(1) and (3) of the Act in this respect, as alleged, see *North Vernon Forge*, supra.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging Jay L. Bolyard on March 26, the Respondent engaged in an unfair labor practice within the meaning of Section 8(a)(1) and (3) of the Act.

4. By removing union newsletters from the union bulletin board at its Morgantown, West Virginia facility, Respondent violated Section 8(a)(1) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

With respect to the necessary affirmative action, it is recommended that Respondent be ordered to offer Jay L. Bolyard immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent positions, dismissing, if necessary, any temporary employees or employees hired subsequently, without prejudice to his seniority or other rights and privileges previously enjoyed, and make him whole for any loss of earnings he may have suffered because of the discrimination practiced against him by payment to him of a sum of money equal to that which he normally would have earned from the date of the discrimination to the date of reinstatement in accordance with the method set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).³

The Respondent also shall be ordered to remove from its files any reference to the illegal termination and notify him in writing that this has been done and that evidence of the unlawful termination will not be used as a basis for future personnel action against him. Respondent also shall, at the

family outside the 30-minute area with a sham address within the 30-minute area, but who continued to live with his family outside the area. In the awards section of the decision, the arbitrator states, “Unless the grievant . . . moves into a home [within a 30-minute drive] he is to be deemed in violation [of the contract]. If he does so change his residence.” (Emphasis added.) The decision in no way addressed whether Percy’s family had to move also.

³Under *New Horizons*, interest is computed at the “short-term Federal rate” for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

request of the Union, permit the reposting of the union newsletter that was involved.

Otherwise, it is not considered necessary to issue a broad Order.

David L. Shepley, Esq., for the General Counsel.

John C. Unkovic, Esq., of Pittsburgh, Pennsylvania, and *Edward Kennedy, Esq.*, of Fairmont, West Virginia, for the Respondent.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

RICHARD H. BEDDOW JR., Administrative Law Judge. A decision in this proceeding was issued on April 5, 1993. On October 25, 1993, the Board remanded the proceeding to me for additional findings of fact regarding certain asserted inconsistent testimony.

Jay Bolyard was a 6-month probationary electrician at the Respondent's Morgantown, West Virginia facility. On March 19, 1992, his supervisor, John Shawhan, recommended to Division Manager Robert Cockrell that Bolyard be discharged (because, as discussed in the prior decision, Bolyard had not moved his family to within 30 minutes' driving range from Morgantown) before his probationary period ended March 23.

On March 23, Cockrell told Shawhan (who told Bolyard) that he had received permission to extend the probationary period to June 22, but established that he must move his family by March 29.

As discussed in the prior decision, it is an un rebutted fact of record that on March 25, just prior to seeing Cockrell, Bolyard told Foreman Sausen that he had found a suitable apartment within the 30-minute rule area and that his family would move in with him by management's May 29, 1993 deadline, with his wife transporting his daughter from their new residence to school in Rowlesburg until the end of the school year. Sausen agreed with the solution but "kicked-up" approval to a higher level of management. I find it highly unlikely that Bolyard would then tell Cockrell a different version of what he told Sausen (and omit the timely move of his family), an account that would perpetuate the situation that existed on March 17 when Supervisor Shawhan said a similar arrangement (without the family) was unacceptable. Accordingly, I credit Bolyard's testimony that he told Cockrell the same thing he told Sausen and I find that Cockrell failed to listen to Bolyard because he did not wish to "spar" with or to continue any "debate" with Bolyard and he then "tuned out" Bolyard's additional comment's because he admittedly had already made a preliminary decision on the evening of March 24 to terminate Bolyard. I find Cockrell was annoyed by Bolyard's continued debating with management and, under these circumstances, I do not credit Cockrell's version of the conversation.

Cockrell testified that in a conversation with Bolyard on March 23 there was discussion between them about him wanting to move to a power plant. Prior to that time he had heard nothing about this subject, except that the previous week, Shawhan had mentioned to him something about Bolyard "wishing to work someplace else and I really didn't

focus on that and I cannot recall the specific language of those conversations."

Bolyard testified that he previously had bid on a meter reader job because he was not sure he would pass the CDL license test required for the electrician's position and that he had also had conversations with Shawhan (some in January or February) about the possibility of a power station job and about his long-term advancement with the Company in other areas including power stations and the general offices. I credit the un rebutted statement attributed to Foreman Sausen that after Bolyard was fired Sausen told the electricians that one of the reasons was because Shawhan felt Bolyard would be unhappy as a substation electrician because of his expressed interest in advancing within the Company, a reason that other employees said should be in Bolyard's favor.

Discussion

I find that the above amplification of my Findings of Fact do not require any change in my previous conclusions and I find that Bolyard would not have been discharged so suddenly if he had not engaged in either the concerted action in continuing his argument about the meaning of the contractual 30-minute rule or in his union activity in consulting openly with the union steward about the same matter.

His discharge was not because of his failure to comply with the 30-minute rule but because of his protected concerted and union activity in arguing about it. This conclusion is especially apparent in view of the Respondent's inconsistent and pretextual conduct and reasons which accompanied the sequence of events. Thus, I do not credit Cockrell's testimony that Bolyard never told him on March 25 that he had found a new apartment that met the requirements and would move his family, as it is inconsistent with Bolyard's credible testimony that he told Sausen as well as Cockrell.

I also find that Bolyard's asserted interest in other jobs and advancement with the Company were not reasonably viewable as expressions of dissatisfaction with his electricians position and I find that Respondent's assertion of this alleged dissatisfaction as a valid reason for termination is pretextual, especially in view of the fact that Cockrell takes full responsibility for the decision while at the same time testifying that he "really didn't focus on that and I cannot recall" what Shawhan had said other than Bolyard's "wishing to work someplace else."

In conclusion, I find that the Respondent has failed to show a plausible reason for its actions in terminating Bolyard only 3 days after it had extended his probation from March 23 to June 22. This is especially true inasmuch as the Respondent provides no plausible explanation of why it immediately terminated Bolyard on March 26 rather than waiting 3 days to March 29 to see if Bolyard actually would comply with its deadline. The Respondent did not do so and, accordingly, I find that Cockrell's expressed reasons are false and pretextual. For these reasons and those set forth in my prior decision, I reaffirm my prior conclusion that the General Counsel has shown that Bolyard was terminated for asserting the right to argue his position and that the Respondent thereby violated Section 8(a)(1) and (3) of the Act in this respect, as alleged.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging Jay L. Boylard on March 26, the Respondent engaged in an unfair labor practice within the meaning of Section 8(a)(1) and (3) of the Act.

4. By removing union newsletters from the union bulletin board at its Morgantown, West Virginia facility, Respondent violated Section 8(a)(1) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

With respect to the necessary affirmative action, it is recommended that Respondent be ordered to offer Jay L. Bolyard immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, dismissing, if necessary, any temporary employee or employee hired subsequently, without prejudice to his seniority or other rights and privileges previously enjoyed, and make him whole for any loss of earnings he may have suffered because of the discrimination practiced against him by payment to him of a sum of money equal to that which he normally would have earned from the date of the discrimination to the date of reinstatement in accordance with the method set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987),¹ and, on reinstatement, it shall allow Bolyard a reasonable time to move in compliance with its 30-minute rule.

The Respondent also shall be ordered to expunge from its files any reference to the illegal termination and notify him in writing that this has been done and that evidence of the unlawful termination will not be used as a basis for future personnel action against him. Respondent also shall, at the request of the Union, permit the reposting of the union newsletter that were involved.

Otherwise, it is not considered necessary to issue a broad Order.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²

¹ Under *New Horizons*, interest is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Monongahela Power Company, Morgantown, West Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging any employee for activity protected by Section 7 of the Act.

(b) Interfering with, restraining, or coercing its employees in the exercise of rights guaranteed by Section 7 of the Act by removing union newsletters from union bulletin boards at the facilities.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Jay L. Bolyard immediate and full reinstatement and make him whole for the losses he incurred as a result of the discrimination against him in the manners specified in the remedy section of this decision.

(b) Remove from its files any reference to his discharge and notify him of the unlawful discharge will not be used as a basis for future personnel actions against him.

(c) Allow, if so requested by the Union, repost of the union newsletters previously removed.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all records, reports, and other documents necessary to analyze the amount of backpay due under the terms of this decision.

(e) Post at its Morgantown, West Virginia facility copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by an authorized representative of Respondent, shall be posted by Respondent immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or cover by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.⁴

³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

⁴ Following service of this supplemental decision on the parties, the provisions of Sec. 102.46 of the Board's Rules and Regulations shall apply.